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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JANET BAWAAN, Plaintiff and Appellant, v. CIVIL SERVICE COMMISSION OF LOS ANGELES COUNTY, Defendant and Respondent; COUNTY OF LOS ANGELES, Real Party in Interest and Respondent.	B230200 (Los Angeles County Super. Ct. No. BS122243)

APPEAL from an order of the Superior Court of Los Angeles, Robert O'Brien, Judge. Affirmed.

Janet Bawaan, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Schuler, Brown & Ekizian, Jack M. Schuler, Linda Diane Anderson and Sam D. Ekizian for Real Party in Interest and Respondent.

Appellant Janet Bawaan, appearing in propria persona, appeals the order of the trial court denying her petition for writ of administrative mandate. The court concluded, based on its independent review of the evidence presented during appellant's three-day administrative hearing before the Los Angeles County Civil Service Commission (the Commission) that appellant was properly medically released from her position with the Department of Mental Health (the Department) for the County of Los Angeles (the County) in 2003 because the evidence demonstrated that she had been totally disabled and unable to work in any capacity since 1995. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is a registered nurse and holds a master's degree in psychology. She was employed in various capacities by the Department between 1978 and 1995, first as a student worker and nursing attendant, then as a staff nurse, and finally as a mental health counselor in the men's central jail. The last day she worked was May 22, 1995.

A. *Appellant Workers' Compensation Claim*

On appellant's last day of work, she experienced severe back pain and pain radiating down her leg. She collapsed and was for a brief period incapacitated while surrounded by inmates. Appellant filed a workers' compensation claim.[1] Her psychologist, Vera David, Ph.D., diagnosed appellant as temporarily totally disabled from a psychiatric standpoint due to major depression and anxiety, with

[1] Appellant had also filed workers' compensation claims in 1983 and 1991, the former based on an assault by a patient and the latter based on work-related stress and aggravation of prior injuries. The 1983 claim was resolved in 1988 by an award based on a 26.75 percent work-related disability. The 1991 claim was apparently dismissed.

post-traumatic stress features. Dr. David stated that appellant also suffered physical symptoms associated with depression and anxiety, including headaches, high blood pressure, and an ulcer. During this period, appellant was also diagnosed with disc degeneration, which caused neck, back, and leg pain.

In February 1996, appellant fell at home, striking her head and losing consciousness. A year and a-half later, in August 1997, appellant was in a serious automobile accident. These incidents, particularly the automobile accident, exacerbated appellant's back and neck problems and caused them to become debilitating. She lost the ability to drive and could walk only with support, first a cane and then a walker. As time passed, she began to report additional maladies, including numbness in her face, blurred vision, tinnitus, dizziness, nausea, insomnia, and shortness of breath, and was diagnosed with fibromyalgia, diabetes, and thyroiditis.

Between 1995 and 2001, Dr. David periodically provided reports to Tristar Risk Management (Tristar), the Department's workers' compensation administrator. All the reports stated that appellant continued to be totally disabled from a psychiatric standpoint.[2] Many of the reports described appellant as too debilitated to accomplish even ordinary, non-work related tasks, such as cleaning her house or paying her bills. Dr. David further stated that appellant suffered from problems with her cognitive abilities, which the doctor described over the years as "confusion," "problems with concentration and attention," "lack of cohesion in her

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[2] During this period, Dr. David occasionally stated that appellant wanted to return to work and suggested that appellant might some day be able to return to work for the Department, but never indicated in any report that appellant was able to perform any type of job, even a modified job. All the reports stated she was, as of the date of the report, totally disabled.

thinking," loss of "train of thought," and "difficulty in focusing and sustaining attention." In 2001, she diagnosed dementia.[3]

In September 2001, Dr. David prepared a comprehensive report that declared appellant "permanent and stationary." At that time, she reported that appellant suffered moderate to severe impairment in eight work-related functions, including "[a]bility to comprehend and follow instructions," "[a]bility to perform simple and repetitive tasks," and "[a]bility to maintain a work pace appropriate to a given workload." In January 2002, Robert J. Tomaszewski, Ph.D., an agreed medical examiner in the field of neuropsychology, assessed appellant and agreed she had "memory, attention and language problems." In January 2003, Dr. David again described appellant's psychiatric condition as "permanent and stationary" and described her psychological problems as "chronic and entrenched." That same month, January 2003, Robert Shorr, M.D., an agreed medical examiner in the field of neurology, confirmed that appellant was "not feasible for retraining or to return to work based on her overall medical, orthopedic, neurological and psychiatric status."[4]

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[3] Dr. David ascribed appellant's cognitive problems to head trauma which occurred in the 1996 fall and the 1997 automobile accident.

[4] Although the administrative record includes medical reports that covered appellant's condition up to the date of the hearing in 2008, we focus on the period from 1995 through 2003, the period relevant to this litigation. We note, however, that in July 2004, Dr. David described appellant as having been permanent and stationary since September 2001, and further stated: "I do not anticipate that she will be able to return back to her job at the County" and "she is probably not able or feasible for retraining in her present state." In March 2004, Thomas E. Preston, M.D., an agreed medical examiner in the field of psychiatry, similarly stated "there is little likelihood that her psychiatric condition will change" and that "[appellant] is probably not able or feasible for retraining in her present state." He agreed that appellant was reasonably psychiatrically permanent and stationary in 2001, when examined and found to be so by Dr. David.

The workers compensation claim is still pending.[5]

B. *Appellant's Long-Term Disability Claim and Medical Release*

In August 1996, approximately one year after her last day at work, appellant was notified by Voluntary Plan Administrator, Inc. (VPA), the third-party administrator of the Department's long-term disability plan, that she was eligible for temporary long-term term disability effective retroactively to November 22, 1995.[6] The notice stated that these benefits were short term, would continue for two years assuming she was unable to return to work during that period, and were not based on her being totally disabled under Social Security criteria. After that period, benefits would continue only if she met the Social Security definition of total disability.

In June 1997, approximately two years after appellant's last day at work, the Department sent appellant a "Notice of Offer of Modified or Alternate Work," which stated the Department was offering her a "mental health modified position." The notice asked appellant to accept or reject the offer within 30 days. Appellant returned the notice with a handwritten note, stating: "I feel I cannot reject or accept this offer because: It is not applicable. I am temporarily psychiatrically disabled [and] still neurologically [and] medically disabled."

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[5] In August 2006, a WCAB judge found that certain of appellant's conditions arose out of or in the course of employment and issued an award. The County filed a petition for reconsideration, and the judge rescinded the award.

[6] Although no application is in the record, appellant testified at the administrative hearing that she submitted an application to receive these benefits and that she periodically filled out VPA forms to continue to receive them. A "[d]isability [p]rogress [r]eport" prepared by appellant in September 2003 stated that she was temporarily totally disabled, unable to work and unable to perform another occupation. As of the date the underlying petition was filed, appellant was still receiving those benefits.

In April 1998, VPA informed appellant that it had "completed [its] review of the current medical records" and concluded that her condition "does meet the Social Security Disability criteria" and that appellant was therefore entitled to long-term term disability benefits to age 65.[7] The letter further stated that VPA "may need to have you examined from time to time in the future to verify that the Social Security criteria are still being met."

By letter dated September 4, 2003, the Department informed appellant of its intent to medically release her from her position "without prejudice" based on: (1) her absence from work since May 1995; (2) the VPA finding that she met the Social Security criteria for total disability; and (3) her ongoing receipt of long-term disability benefits. By letter dated October 31, 2003, the Department informed appellant that effective that date, she was medically released "without prejudice" under Los Angeles County Civil Service Rule 9.08. The letter stated: "Your condition has been found to meet the Social Security criteria for total disability. You are receiving Long-Term Disability (LTD) benefits and will continue receiving this benefit until age 65, as long as you continue to meet LTD plan requirements."

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[7] The letter explained: "According to Social Security, in order for an individual to be considered disabled, a person must be unable to do any substantial gainful work due to a medical condition which has lasted or is expected to last twelve (12) months in a row. The condition must be severe enough to keep a person from working not only in his or her usual job, but in any other substantial gainful work. Social Security takes into consideration the person's age, education, training and work experience when a decision is made as to whether a claimant can work. The test of disability is not whether or not an individual is able to go back to his or her old job; or whether or not the individual may have been able to find a job lately. Social Security's further test is whether the individual is capable of doing jobs available in the national economy."

C. *Administrative Proceeding*

On October 31, 2005, appellant brought suit for employment discrimination and wrongful termination. In June 2006, by stipulation and order, that action was stayed to allow appellant to pursue her administrative appeal rights with the Commission. As a result of the stipulation and order, the County served an amended notice of termination by letter dated June 30, 2006. The notice reiterated that appellant had been medically released without prejudice under Los Angeles County Civil Service Rule 9.08, effective October 31, 2003, and reiterated the reasons expressed in the 2003 letters. It also referenced several 2003 medical reports from Dr. David stating that appellant was totally disabled and incapable of "occupational functioning." The letter informed appellant for the first time that she had the right to appeal the action by requesting a hearing before the Commission within 15 business days.[8] Appellant sought review of the decision to medically release her and a hearing before the Commission.

The administrative hearing took place over three days -- June 19 and 20, and November 24, 2008.[9] On the first day, the hearing officer summarized the issues as follows: (1) "[W]ere the allegations in the Department's amended letter dated June 30, 2006 true as of October 31, 2003?" (2) "[I]f any or all such allegations [were] true, was [appellant's] separation for medical reasons on October 31, 2003,

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[8] The 2003 letters had stated that appellant had a right to "respond to the information contained in [the] letter[s]" by contacting the Department's Return to Work Coordinator within 10 business days. Appellant had responded to the letters, stating that she "refused to accept" the termination of her employment, that her workers' compensation claim was pending, and that according to her doctors, she continued to be temporarily totally disabled.

The 2006 letter also explained for the first time that "without prejudice" meant that "should [her] condition improve within two (2) years of the date released, [she was] entitled to seek reinstatement with the County."

[9] Appellant was represented by counsel at the hearing.

appropriate?" During the hearing, the hearing officer stated that he would also determine whether there was a suitable position appellant could have performed satisfactorily during the relevant period in order to resolve whether the medical release was appropriate.

During the proceeding before the Commission, the parties primarily disputed whether the Department had properly interpreted and applied two Los Angeles County Civil Service Rules: Rule 9.07 and Rule 9.08. Rule 9.07A provides that the director of personnel "may require a reasonable medical reevaluation [of an employee] at the time of promotion, demotion, reassignment, or other changes of status of an employee from one class to another class with increased physical, psychological and environmental demands" and that the change of status "shall not be completed until the employee has shown that the increased physical, psychological and environmental demands are met." Rule 9.07B allows the employee to personally request a medical reevaluation, in order to "determine the capacities of the employee to perform the duties of the employee's job satisfactorily and without undue hazard to the employee or others." Rule 9.07C provides: "If the employee's condition is the result of a work-incurred injury which falls within the jurisdiction of the workers' compensation appeals board [WCAB], the determination by the director of personnel of the employee's medical capacities shall be based solely upon the medical evidence used by the [WCAB] in its disposition of the case."

Los Angeles County Civil Service Rule 9.08 lists the alternatives available when "upon medical reevaluation or competent medical or legal evidence, an employee who has previously qualified is found to be unable to perform the duties of his/her position satisfactorily, due to a medical incapacity of a continuing nature." Under Rule 9.08A, the employee can submit a request for reassignment or transfer to a position for which he or she is qualified. If the employee does not

request transfer or reassignment under paragraph A, Rule 9.08B gives the director of personnel several options: (1) return the employee to work through modification of duties, change of assignment, change of classification, reduction to another position, or transfer to another department; (2) provide the employee a disability retirement; or (3) release the employee "in accordance with paragraph C." Paragraph C provides: "If there is no suitable position in which the employee can perform satisfactorily, the appointing authority may release the employee . . . [,] said release to be without prejudice as to reemployment should the employee's condition improve."

Appellant took the position that the Department was obliged by Los Angeles County Civil Service Rule 9.07C to base its determination of appellant's capabilities solely on the medical evidence used by the WCAB, and that appellant could not be released until the workers' compensation case was concluded. The Department argued that Rule 9.07 did not apply, as neither the director of personnel nor appellant had requested a medical reevaluation, and that in any event, the director could request such evaluation only where the employee changed status "from one class to another class with increased physical, psychological and environment demands." In the Department's view, Rule 9.08 was the sole relevant provision as it applied whenever, "upon medical reevaluation *or competent medical or legal evidence*," the employee "is found to be unable to perform the duties of his/her position satisfactorily, due to a medical incapacity of a continuing nature . . . ." (Italics added.) Under the Department's view of paragraphs B3 and C of Rule 9.08, the director could release an employee unable to perform his or her duties due to medical incapacity as long as it was clear that there was no suitable position the employee could perform satisfactorily.

After the parties presented evidence, the hearing officer made the following factual findings: (1) appellant was diagnosed as suffering major depressive

disorder in July 1995; (2) for 12 years her disorder was managed with psychotherapy and psychotropic medication; (3) in 1997, in response to the Department's "Notice of Offer of Modified or Alternate Work," appellant stated she was disabled; (4) in 1998, VPA informed appellant that it considered appellant disabled pursuant to Social Security criteria, which meant she was unable to do any "substantial gainful" work; (5) appellant did not contest the determination, and received and has continued to receive long-term term disability benefits; (6) appellant suffered additional injuries in 1996 and 1997, which led Dr. David to add a diagnosis of dementia; (7) in 2001, Dr. David concluded appellant was permanent and stationary; and (8) although appellant claimed she could work in an area that did not involve direct patient contact, she never informed the Department or presented herself to the Department ready to return to work.

With respect to the interpretation of the Civil Service rules, the hearing officer agreed with the Department that Rule 9.07 provided "a tool, medical reevaluation, with which to evaluate an employee's ability to perform his/her existing position or a new one," and that the evaluation was "undertaken at the request of the employee or at the direction of the appointing authority and/or the director of human resources, subject to the limitation contained in subdivision C for work-related injuries." Rule 9.08, on the other hand, "provides options if the medical reevaluation or other competent or legal evidence establish that the employee is partially or fully incapacitated." Rule 9.08 "applies regardless of the reason for the disability and, unlike Rule 9.07, contains no express exception or limitation for work-related injuries [or an express requirement for] . . . a determination by the WCAB. [¶] . . . Rule 9.08 permits the Department, 'upon medical reevaluation or competent medical or legal evidence,' to medically release an employee, '[i]f there is no suitable position in which the employee can perform satisfactorily.'"

Based on its factual findings and its interpretation of the Civil Service rules, the hearing officer concluded that "[o]n October 31, 2003, the effective date of her medical release, [a]ppellant was unable to perform the duties of her position satisfactorily due to medical incapacity of a continuing nature and there was no suitable position that she could perform satisfactorily." The hearing officer explained that VPA's April 1998 determination "establishe[d] that on October 31, 2003, the effective date of [a]ppellant's medical release, [a]ppellant was unable to perform the duties of her position satisfactorily due to medical incapacity of a continuing nature and that there was no suitable position that she could perform satisfactorily." Moreover, the VPA determination was "consistent with evidence submitted at the hearing regarding [a]ppellant's disability" which also "established that there was no suitable position the appellant could have performed satisfactorily on October 31, 2003."

On June 17, 2009, the Commission approved the hearing officer's decision. Appellant moved for reconsideration. By letter dated June 25, 2009, the Commission denied her request.[10]

D. *Petition for Writ of Administrative Mandate*

In August 2009, appellant filed a petition for writ of mandate seeking to overturn the decision of the Commission affirming the Department's decision to medically release her. Appellant subsequently amended her petition with the permission of the court. As had been asserted at the administrative hearing, the operative petition contended that Los Angeles County Civil Service Rule 9.07C required that her medical capabilities be evaluated based solely on medical

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[10] As the Commission reviewed and adopted it, the hearing officer's decision will hereafter be referred to as the "Commission's" decision.

evidence used by the WCAB and precluded the Department from releasing her until the workers' compensation proceeding was concluded. The petition further alleged that the Department and/or Tristar failed to pay for some of the treatments appellant's doctors had recommended for her various maladies and asserted that this alleged failure to pay for treatment hampered her recovery.[11] Appellant contended that she applied for long-term term disability because Tristar was not paying temporary disability benefits and that had she known applying for the benefits would cause her to lose her job, she would not have done so.[12] She further alleged that she had never been properly offered a modified position, that there were positions within the Department she could have performed, and that there were doctors' reports that supported her ability to work in an alternate position.

The trial court reviewed the evidence, exercising its independent judgment, and denied the petition.[13] The court concluded there was no authority for the proposition that the Department could not release appellant while her workers' compensation claim was pending. The court agreed with the Department and the Commission that Los Angeles County Civil Service Rule 9.07 "applies solely to a medical reevaluation done when an employee changes from one class to another

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[11] Appellant reasserts this allegation on appeal, but her brief contains no argument on this point and she fails to cite to any support for the proposition that the responsibility for her continuing disability is Tristar's or the Department's. An appellant's failure to make cogent legal arguments concerning issues raised and to support such arguments with references to the record results in forfeiture. (*People v. Stanley* (1995) 10 Cal.4th 764, 763; *Rand v. Board of Psychology* (2012) 206 Cal.App.4th 565, 576; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1245-1246 & fn. 14.)

[12] Appellant also reasserts this contention on appeal, without providing any legal argument in her brief or citing to evidence in the record indicating whether or for what period Tristar was paying temporary disability benefits.

[13] Judge Chalfant presided over preliminary proceedings. Judge O' Brien presided over the hearing on the petition. The court's factual findings were in accordance with the summary of facts set forth above.

'with increased physical, psychological, and environmental demands,'" and that Rule 9.08 permitted the Department to release appellant if there was no suitable position which she could perform satisfactorily. The court found that the condition was met because appellant was unable to "'engage in any substantial gainful employment'" under Social Security criteria and because "[t]he medical evidence demonstrate[d] that she [was] completely unable to work." Accordingly, the court concluded that the Department "was justified in releasing [appellant] from employment pursuant to [Rule 9.08]." This appeal followed.

DISCUSSION

A. *Standard of Review*

A quasi-judicial administrative decision is reviewable by way of petition for administrative mandamus under Code of Civil Procedure section 1094.5. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567; *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848.) The scope of review was laid out by the Supreme Court in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 123-124: "[T]he scope of inquiry in a mandamus proceeding brought to inquire into the validity of a final administrative order shall extend to whether the respondent has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence."

In reviewing administrative decisions that affect the petitioner's vested fundamental rights, the trial court examines the administrative record and exercises independent judgment on the evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143; *Rand v. Board of Psychology*, *supra,* 206 Cal.App.4th at p. 574.) The right to

practice a trade or profession is a fundamental vested right. (*Id.* at p. 574; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 173.) In exercising independent judgment, the trial court makes its own credibility determinations and draws its own inferences, but at the same time affords a strong presumption of correctness to the administrative decision. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811-812; *Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs*. (2003) 107 Cal.App.4th 860, 868.) The burden of proof rests on the complaining party to convince the court that the agency's decision is contrary to the weight of the evidence. (*Fukuda v. City of Angels*, *supra*, at pp. 817, 820.)

Our review is limited to determining whether the record provides substantial evidence supporting the factual findings. (*Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1077-1078.) In making our determination, "we review the trial court's factual findings, not those of the administrative agency." (*Rand v. Board of Psychology*, *supra*, 206 Cal.App.4th at p. 591.) "[W]e may not reweigh the evidence, but consider that evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all conflicts in its favor." (*Breslin v. City and County of San Francisco*, *supra*, at p. 1078.) We are not, however, bound by any legal interpretations made by the trial court or the administrative body; "rather, we make an independent review of any questions of law." (*Rand v. Board of Psychology*, *supra*, at p. 575.)

B. *Interpretation of Civil Service Rules*

The trial court stated in its order that appellant's petition and briefs were "ambiguous, lacking in any clear argument or linear thought" and that "[a]s best the court can determine the gist of her claim . . . is that she believes that she cannot be released from her County employment while she is receiving workers'

compensation benefits." The court concluded that the applicable Civil Service Rules permitted the medical release of an employee who was unable to perform the duties of his or her position and for whom no suitable position could be found without regard to the pendency of a workers' compensation claim. Appellant's brief on appeal is equally difficult to comprehend. To the extent appellant asserts that the Rule 9.07 required her release to be based on the evidence used by the WCAB and could not occur until the workers' compensation case was resolved, in the exercise of our independent judgment, we agree with the trial court and the Commission concerning the interpretation of the applicable rules.

Although the rules at issue are Civil Service Rules, promulgated by the County, the normal rules of statutory construction apply. (See *Mason v. Retirement Board* (2003) 111 Cal.App.4th 1221, 1227; *Alesi v. Board of Retirement* (2000) 84 Cal.App.4th 597, 601-602.) The words of the rules are to be given "a plain and commonsense meaning. When they are clear and unambiguous, there is no need for judicial construction . . . ." (*Id.* at p. 602.)

Under its plain language, Los Angeles County Civil Service Rule 9.07A governs when a medical reevaluation may be required -- essentially when an employee changes status "from one class to another class with increased physical, psychological and environment demands." It says nothing about when an employee may be terminated or released. Rule 9.08 governs medical releases and clearly states that an employee may be released whenever "upon medical reevaluation *or competent medical or legal evidence*" an employee is found to be "unable to perform the duties of his/her position satisfactorily," subject only to the proviso of 9.08C that there be "no suitable position in which the employee can perform satisfactorily." (Italics added.) The Department could therefore properly rely on any competent medical or legal evidence to conclude that appellant was

unable to perform her regular duties or any alternate position, and was not required to await resolution of the workers' compensation claim.

C. *Reliance on Social Security Criteria*

Appellant contends that in affirming the Department's decision to medically release her, the Commission erred in relying on Social Security disability criteria.[14] She concedes she was unable to perform the duties of the position she last held, but contends that despite her representations to VPA, she was capable of performing an alternate position and that Los Angeles County Civil Service Rule 9.08C required the Department to offer her one prior to medically releasing her.

The Social Security Act defines disability as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." (42 U.S.C. § 423(d)(1)(A).) A party's sworn declaration in an application for disability benefits that he or she is disabled within the definition of the Act does not conclusively establish that the party could not perform the essential functions of his or her position with modification or reasonable accommodation. (*Cleveland*

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[14] In her reply brief, appellant raises for the first time the argument that the use of Social Security criteria represented the adoption of an "'underground'" regulation in violation of the Administrative Procedures Act (Govt. Code, § 11340 et seq.). We need not address arguments raised for the first time in a reply brief. (*City of Merced v. American Motorists Ins. Co*. (2005) 126 Cal.App.4th 1316, 1328-1329; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Moreover, as discussed, appellant's release was in compliance with established Civil Service Rules, specifically, Rule 9.08 which permits medical release upon any "competent medical or legal evidence" when the employee is "unable to perform the duties of his/her position" and there is "no suitable position. . . . which the employee can perform satisfactorily." As we discuss below, the evidence overwhelmingly established that appellant's medical condition rendered her unable to perform any position within the Department.

v. Policy Mgt. Sys. Corp. (1999) 526 U.S. 795, 805; *Davis v. Los Angeles Unified School Dist. Personnel Com*. (2007) 152 Cal.App.4th 1122, 1140.) However, in any ensuing litigation with the employer in which the employee's ability to perform the requirements of a job is at issue, the burden is on the employee to explain the inconsistency between the prior claim of total disability from any occupation and the claim that the employee could have performed the responsibilities of his or her job, a modified position, or an alternate position. (*Cleveland v. Policy Mgt. Sys. Corp*., *supra*, at p. 807.) The prior assertion of total disability negates an essential element of the subsequent claim -- that the employee could perform the essential functions of a position or a modified or alternate position -- and may be considered dispositive if contrary evidence is not offered by the employee. (*Ibid*.)

Appellant presented no evidence to support the contention that she would have been able to perform an alternative or modified position. The medical evidence presented at the hearing described her as suffering from incapacitating physical and mental disabilities of long standing. The medical reports provided by Dr. David and other physicians during the relevant period and well beyond it uniformly described appellant as totally disabled and unable to perform any occupation. In 1995, Dr. David said appellant was psychologically debilitated and in constant pain due to her injured back. Dr. David portrayed appellant as unable to accomplish even ordinary household tasks. After her fall at home in 1996 and the automobile accident in 1997, appellant's physical and mental condition deteriorated. She could not walk or drive a car. In 2001, she was diagnosed with dementia. Dr. David specifically described multiple work-related functions appellant would have difficulty accomplishing, including "comprehend[ing] and follow[ing] instructions," "perform[ing] simple and repetitive tasks," and "maintain[ing] a work pace appropriate to a given workload." As time passed,

appellant begun to suffer from additional maladies, including fibromyalgia, diabetes, and thyroiditis. In 2001 and 2003, Dr. David stated that appellant was permanent and stable and totally disabled from a psychiatric standpoint.

Appellant does not contend that at any point prior to filing the lawsuit in October 2005 she informed the Department that she was capable of returning to work in any capacity.[15] To the contrary, her responses to the June 1997 letter offering her a modified position and the September and October 2003 letters notifying her of the decision to medically release her all indicated she continued to be totally disabled. No evidence was presented at the administrative hearing that she informed anyone at the Department of her ability to work between 1995 and October 2005.

In her brief, appellant relies on statements taken out of context from isolated medical reports prepared in 2003 and 2004 to support that she could have performed alternate work. She cites a May 2003 report from Stanley Majcher, M.D., an internist, a January 2004 report from Philip Sobol, M.D., an orthopedist, and a February 2004 report from Dr. Shorr, an agreed medical examiner in the field of neurology. None of these reports supported that appellant would have been able to return to work during the relevant period.

In his May 2003 report, Dr. Majcher, the internist, described the results of a physical examination of appellant. He stated she was suffering from diabetes, back pain, and blockage in a coronary artery, and that she was using a walker. He confirmed that she was "precluded from performing her usual and customary job." He nonetheless recommended "vocational rehabilitation," which generally is

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[15] The complaint in that litigation is not in our record. As it asserted a claim for wrongful termination, we presume that appellant asserted the ability to work for the Department in some capacity.

recommended only where it appears the injured employee may be able to return to employment through the provision of vocational rehabilitation services. (See *Beverly Hilton Hotel v. Workers' Comp. Appeals Bd*. (2009) 176 Cal.App.4th 1597, 1602, fn. 4.) However, Dr. Majcher's opinion was as to appellant's physical condition only. He did not evaluate her psychological or mental state, which, as we have said, rendered her completely unable to work according to Dr. David, her psychologist, and Dr. Preston, the agreed medical examiner in the field of psychiatry, throughout 2003 and 2004.

Dr. Sobol, the orthopedist, stated in his January 2004 report that "from an orthopedic standpoint," appellant would require "work restrictions," but was "eligible for vocational rehabilitation." But he also stated that he "deferred to [Dr.] David" with respect to appellant's psychological condition. Dr. Shorr, the agreed medical examiner in the field of neurology, whose January 2003 report, discussed above, described appellant as "not feasible for retraining or to return to work based on her overall medical, orthopedic, neurological and psychiatric status," stated in February 2004 that *according to Dr. Sobol*, appellant was "eligible for vocational rehabilitation."[16] In his February 2004 report, Dr. Shorr clearly stated that his opinion that appellant was unsuitable for retraining and unable to work "remain[ed] unchanged."

The only other medical report cited by appellant in her brief that was in evidence at the administrative hearing was prepared long after her October 2003 medical release and was, therefore, irrelevant to the question whether she could have qualified for an alternate position in October 2003 or any reasonable period

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[16] Reports prepared by doctors during this period frequently discussed other doctors' reports in order to express agreement or disagreement with the conclusions.

before or after.[17] A July 2007 report by Dr. Preston -- an agreed medical examiner in the field of psychiatry, who had previously described appellant as "probably not able or feasible for retraining" -- stated: "[I]t appears she could return to work as an R.N. in a sedentary-type position." The sole bases given for this sudden change in opinion were appellant's representations that "she feels optimistic about attempting to return to work as a registered nurse" and "she feels she could do medical review or other more sedentary nursing jobs." The conclusion was completely refuted by Dr. David's 2007 and 2008 reports, which stated that appellant continued to suffer major depressive disorder, anxiety, PTSD, and dementia, and gave no indication that appellant's inability to return to work in any capacity had changed.[18] Additionally, multiple physicians reported in 2007 and 2008 that appellant's blood pressure had spiraled out of control and that her thyroid

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[17] In her brief, appellant also cites two one-page letters written in 2009, after the administrative hearing took place. The first, prepared by Dr. David and dated May 2009, referred to Dr. Sobol's January 2004 report, Dr. Shorr's February 2004 report, and Dr. Preston's 2007 report (all described above) and stated without further explanation: "I agree with Dr. Preston and the other doctors that [appellant] could perform alternate work at the County." The second, prepared in December 2009 by Darrell H. Burstein, M.D., an internist, stated: "Please be advised that [appellant] may return to work as of January 4, 2010 as a Mental Health Counselor RN in an alternative job at the [Department's] Medical Review Inpatient Consolidation Unit." As neither letter contained any analysis or, in Dr. David's case, explanation why the conclusion was so at odds with her contrary opinion uniformly expressed in reports up to that date, they cannot be relied on to support the opinions they purport to express. (See *Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847 ["are worth no more than reasons and factual data upon which they are based"]; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 ["[A]n opinion unsupported by reasons or explanations does not establish the absence of a material fact issue for trial . . . ."].) Moreover, as the documents were not part of the administrative record and were prepared long after the relevant period, they were properly disregarded by the trial court.

[18] In November 2007, Dr. David described appellant as "totally dysfunctional" and said: "[A]lthough she claims to want to go back to work, given her current psychiatric and medical condition, her prognosis, in my opinion, remains guarded."

disease was preventing her from stabilizing physically or mentally.[19] As Dr. Preston's opinion was unsupported by analysis and contradicted by every other medical report promulgated during the same period, there was no basis for the hearing officer or the trial court to give it credence. (See *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58-59 [citing cases supporting the proposition that expert opinion based on self-serving statement of party is "almost worthless"].)

C. *Knowledge and Understanding of Department Personnel and VPA*

Appellant devotes a great deal of her brief to the October 2003 letter informing her of her medical release and questioning the subjective understanding of the persons within the Department who drafted the letter or participated in drafting it. She contends Department personnel did not understand Social Security criteria and did not have personal knowledge that appellant was receiving long-term term disability payments. She further contends that the decision of VPA, a private entity, that she met Social Security criteria was insufficient to support the medical release.

The issue at the administrative hearing was not whether appellant was disabled under Social Security criteria or whether VPA or Department personnel fully understood Social Security disability criteria, but whether, in view of the evidence presented at the hearing, the medical release of appellant was justified. The parties submitted multiple volumes of medical reports that discussed

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[19] Appellant was asked at the administrative hearing whether she was capable of performing a sedentary position within the Department's medical reimbursement unit as of the date of the hearing. She initially testified "[y]es," but added the proviso "once [the thyroid and blood pressure issues are resolved], I should [have] no problem doing this type of work."

appellant's medical condition from 1995 up to the dates of the 2008 hearing. In addition, appellant testified as to her physical and medical condition. The hearing officer concluded based on all the evidence that appellant was unable to perform the duties of her former position due to medical incapacity and that there was no suitable alternate position she could satisfactorily perform. The trial court conducted an independent review of the evidence and concluded that appellant was unable to engage in any substantial gainful employment because the medical evidence demonstrated that she was completely unable to work. We have reviewed the trial court's conclusion for substantial evidence. As we have discussed, the evidence supporting that appellant was unable to engage in any productive employment went beyond "substantial" and was, for all intents and purposes, uncontradicted.[20] The subjective knowledge and understanding of Department personnel or VPA personnel is irrelevant.

D. *Notice*

Appellant contends that the Commission erred in failing to rule on the violation of a "[f]undamental [v]ested [r]ight" and "[d]ue [p]rocess," apparently referring to the lack of notice in the October 2003 letter of the right to appeal the Department's medical release to the Commission. As discussed, the parties rectified this oversight in their stipulation under which the Department sent out a second letter -- in June 2006 -- which contained the proper notice of the right to

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[20] Appellant also contends that the October 2003 letter was "hearsay" on which the hearing officer improperly relied to establish that appellant was disabled under Social Security criteria. Appellant herself testified that she was receiving long-term term disability from VPA and that she had represented herself to be totally disabled in order to receive it. The hearing officer also received into evidence a form signed by appellant stating that she was unable to work in her usual position or to perform another occupation.

appeal. Appellant appealed to the Commission within 60 days of that letter and no issue was raised concerning the timeliness of her appeal.

E. *Terminology*

Appellant contends the June 2006 letter wrongly stated that she was "terminated" rather than "released" and that this somehow resulted in the destruction of her personnel file. The June 2006 letter does refer to itself as an "Amended Notice of Termination." However, we see no prejudice to appellant from the terminology utilized. Both the hearing officer and the trial court addressed whether she was properly medically released under Los Angeles County Civil Service Rule 9.08. With respect to the Department's alleged destruction of her personnel records, this was not raised at the administrative hearing or in the court below and cannot be considered for the first time on appeal.

DISPOSITION

The order denying appellant's petition for writ of mandate is affirmed. The County is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.